(6)

No. 90-1141

In the Supreme Court of the United States

OCTOBER TERM, 1990

RAFEH-RAFIE ARDESTANI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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41

QUESTION PRESENTED

Whether the Equal Access to Justice Act authorizes the award of attorney's fees and expenses for an administrative deportation proceeding before the Immigration and Naturalization Service.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A40) is reported at 904 F.2d 1505. The opinions of the Board of Immigration Appeals (Pet. App. A43-A47) and of the Immigration Judge (Pet. App. A48-A54) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1990. A petition for rehearing was denied on September 5, 1990. Pet. App. A41. The petition for a writ of certiorari was filed on December 3, 1990, and granted on March 4, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an Iranian citizen, entered the United States as a visitor in December 1982. Pet. App. A4. She lawfully remained in this country until the end of May 1984, when she sought political asylum. INS denied her application and issued an order to show cause why she should not be deported. Petitioner thereafter conceded her deportability, but renewed her asylum application. The immigration judge granted her request for asylum, and INS did not seek further administrative review. Pet. App. A4-A7.

In the wake of these proceedings, petitioner's counsel filed an application for attorney's fees and expenses covering the costs incurred in the administrative deportation proceedings, asserting entitlement under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504(a)(1). Following the Ninth Circuit's decision in *Escobar Ruiz* v. *INS*, 838 F.2d 1020 (1988), the immigration judge concluded that administrative proceedings under the Immigration and Nationality Act are covered by EAJA, and awarded fees in the amount of $1,071.85. Pet. App. A50, A54.

On INS's appeal, the Board of Immigration Appeals (BIA) vacated the award. Pet. App. A43-A47. It relied on 28 C.F.R. 24.103, which provides that immigration proceedings are not within EAJA's coverage. Pet. App. A46.[1] Noting that "[t]he Board and immigration judges (except as provided by statute) only have such authority as is created and delegated by the Attorney General" (*id.* at A44), the BIA concluded that "absent a regulatory change or controlling court order, an immigration judge has no

[1] The BIA also noted its disagreement with the immigration judge's conclusion that deportation proceedings are within EAJA's scope. Pet. App. A44.

authority under law or regulation to consider an application for attorney fees under EAJA." *Id.* at A46.[2]

The Eleventh Circuit affirmed the BIA's decision, with one judge dissenting. Pet. App. A1-A40. The court of appeals held that EAJA's plain language demonstrates that it does not apply to deportation proceedings. The court explained that EAJA permits the award of fees to a prevailing party in an adversary adjudication before an agency (5 U.S.C. 504(a)(1)). The term "adversary adjudication" is defined (5 U.S.C. 504(b)(1)(C)) as "an adjudication under [5 U.S.C.] section 554." Agreeing with three other circuits, the court held that the term "under section 554" means "governed by" or "subject to" Section 554. Pet. App. A18-A19.[3] Because the procedures prescribed in Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252—not those of 5 U.S.C. 554—govern deportation proceedings, a deportation proceeding is not, the court concluded, an "adversary adjudication" under EAJA. Pet. App. A18-A22.

[2] The Board recognized that in *Escobar Ruiz*, the Ninth Circuit had held en banc that EAJA does apply to administrative deportation hearings, but explained that "authority from one circuit is not binding in another." Pet. App. A46-A47.

[3] The court cited *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446, 449-451 (D.C. Cir. 1989); *Owens* v. *Brock*, 860 F.2d 1363, 1366 (6th Cir. 1988); and *Clarke* v. *INS*, 904 F.2d 172 (3d Cir. 1990). Since the decision below, two other circuits have reached the same conclusion. *Hodge* v. *United States Dep't of Justice*, 929 F.2d 153 (5th Cir. 1991); *Escobar* v. *INS*, No. 90-2901 (4th Cir. June 4, 1991). See also *Full Gospel Portland Church* v. *Thornburgh*, 927 F.2d 628 (D.C. Cir. 1991).

The court found further support in the fact that in regulations implementing EAJA (28 C.F.R. 24.103 (1982)), the Attorney General did not include deportation proceedings among the "adversary adjudications" conducted within the Department of Justice. Pet. App. A22-A26. The court concluded that Congress was presumptively aware of this regulation when it reenacted EAJA in 1985 without altering the relevant statutory language. *Id.* at A23-A25.[4]

Finally, the court relied (Pet. App. A26-A32) on Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, which states that "[i]n any exclusion or deportation proceedings, * * * the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." The court observed that "the explicit bar on attorney fees against the government found in [8 U.S.C. 1362] is to be regarded as a narrow exception to the general provisions of EAJA and that partial repeal of section 1362 by implication is unwarranted to achieve the broad purposes of EAJA." Pet. App. A32.[5]

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[4] The court also held that the Attorney General's construction of EAJA—adopted after consultation with the Administrative Conference of the United States, as required under 5 U.S.C. 504(c)(1)—is a permissible construction of the statute, and thus entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[5] The court also concluded that the existence of 8 U.S.C. 1362 is a "special circumstance mak[ing] an award unjust" under EAJA (5 U.S.C. 504(a)(1)). The court observed that "[i]t would be unjust to allow such an award against the government since Congress specifically has determined that fees against the government are not available in this context." Pet. App. A29.

Senior District Judge Pittman (sitting by designation) dissented (Pet. App. A34-A40), adopting the Ninth Circuit's reasoning in *Escobar Ruiz*.

SUMMARY OF ARGUMENT

EAJA defines—in Section 504(b)(1)(C)(i)—the administrative proceedings for which attorney's fees may be available as "adjudication[s] under section 554 of [title 5] * * *." In *Marcello* v. *Bonds*, 349 U.S. 302 (1955), this Court held that deportation proceedings are not conducted under the Administrative Procedure Act (5 U.S.C. 554), but rather under the comprehensive scheme of the Immigration and Nationality Act. Thus, the plain language of 5 U.S.C. 504(b)(1)(C)(i) compels the conclusion that EAJA is inapplicable to deportation proceedings. The long-established principle that waivers of sovereign immunity must be unequivocally expressed reinforces the evident statutory meaning, and requires rejection of petitioner's argument that "under section 554" should be generously interpreted to mean "similar to those governed by section 554."

EAJA's statutory design and legislative history confirm the plain language of its text. Throughout Section 504, "under" unequivocally means "subject to"; moreover, petitioner's interpretation would render the other subsections of Section 504(b)(1)(C) redundant. What is more, the legislative history shows that, in the various bills that were considered in the course of Congress's enactment of EAJA in 1980, the Article I Branch used the terms "under" and "subject to" interchangeably. After consultation with the Administrative Conference of the United States, as required by 5 U.S.C. 504(c), the Attorney General promulgated regulations in 1982, stating that

administrative deportation proceedings are not covered by EAJA. When Congress reenacted EAJA in 1985 without changing the definition of "adversary adjudication," it indicated no disagreement with that interpretation.

Petitioner asserts that her proposed definition best serves the statutory purpose of encouraging persons aggrieved by unreasonable agency actions to vindicate their rights. That broad contention, which would equally support awards of attorney's fees in all types of agency proceedings, overlooks the fact that EAJA, like most legislation, represents a legislative resolution of a number of competing objectives, including concern for its costs to the public fisc. Respect for Congress's determination requires compliance with the statutorily imposed limitations on the remedy provided.

Even if the meaning of 5 U.S.C. 504(b)(1)(C)(i) were unclear, Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, independently precludes the award of attorney's fees in any administrative exclusion or deportation proceeding. It specifically provides that the person concerned may be represented, but "at no expense to the Government." This explicit ban on the award of attorney's fees was not repealed by implication by the more general provisions of EAJA.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE, READ IN CONJUNCTION WITH THE PRINCIPLE THAT WAIVERS OF SOVEREIGN IMMUNITY MUST BE STRICTLY CONSTRUED, DEMONSTRATES THAT EAJA DOES NOT APPLY TO DEPORTATION PROCEEDINGS

It is well settled that "in all cases involving statutory construction, [the] 'starting point must be the language employed by Congress,' and [the reviewing court must] assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982) (citations omitted); accord *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 310 (1989). Moreover, the plain language of the statute is conclusive unless there is a clearly expressed legislative intention to the contrary. *American Tobacco Co.* v. *Patterson*, 456 U.S. at 68; *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 110 S. Ct. 1570, 1575 (1990).

It is equally well established that a statute that waives sovereign immunity "must be 'construed strictly in favor of the sovereign' * * * and not 'enlarge[d] . . . beyond what the language requires.'" *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983) (citations omitted) (construing Clean Water Act attorney's fee provision, 42 U.S.C. 7607(f)). Accord *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986) (construing Title VII attorney's fee provision, 42 U.S.C. 2000e-5(k), Civil Rights Act of 1964). It follows that waivers of sovereign immunity cannot be implied, but must be unequivocally expressed. *Shaw*, 478 U.S. at 318; *United States* v. *King*, 395 U.S. 1, 4 (1969). Cf. *Pine Hill Coal Co.* v. *United*

States, 259 U.S. 191, 196 (1922) ("where, as here, [the government's] liability would mount to great sums, only the plainest language could warrant a court in taking it to be imposed").

EAJA renders the United States liable for attorney's fees that it would not otherwise owe. See *Escobar* v. *INS*, No. 90-2904 (4th Cir. June 4, 1991), slip op. 8 n.4; *Spencer* v. *NLRB*, 712 F.2d 539, 543-545 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984). It is therefore a statute that waives sovereign immunity, and must be strictly construed in favor of the sovereign. *E.g.*, *In re Perry*, 882 F.2d 534, 538 (1st Cir. 1989); *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446, 449-451 (D.C. Cir. 1989).[6]

[6] Petitioner and amicus American Bar Association (ABA) ignore sovereign immunity principles. Amicus American Immigration Lawyers Association (AILA) discusses sovereign immunity, AILA Br. 9-11, but relies upon inapposite cases. For example, in *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453 (1990), the Court held that equitable tolling principles apply in Title VII actions against the government, because "making the rule of equitable tolling applicable to suits against the government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the Congressional waiver." *Id.* at 457. The instant case, however, does not involve a *de minimis* broadening of the government's waiver (in cases involving the subject matter of that waiver) to make the waiver consistent with a private sector analogue. Instead, the claim here seeks expansion of a statutory term to encompass additional subject matter that would expose the government to potential fee liability in a wide variety of categories of cases wholly outside the statutory text. Moreover, the government does not argue that a "ritualistic formula" is required to waive sovereign immunity. Cf. *Franchise Tax Bd.* v. *United States Postal Sys.*, 467 U.S. 512, 521 (1984). Instead, we simply contend that the congressional intent must be plain before a statute waiving sovereign immunity may be interpreted in the expansive manner advocated by petitioner and amici.

EAJA provides that "[a]n agency that conducts an adversary adjudication shall award [attorney's fees and expenses] to a prevailing party other than the United States," unless the agency position was substantially justified. 5 U.S.C. 504(a)(1). The term "adversary adjudication" is explicitly defined as "an adjudication *under* section 554 of [title 5]" (5 U.S.C. 504(b)(1)(C)(i); emphasis added). It is well established that deportation proceedings are *not* conducted under 5 U.S.C. 554, but rather under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* *Marcello* v. *Bonds*, 349 U.S. 302, 308-310 (1955); *Ho Chong Tsao* v. *INS*, 538 F.2d 667, 669 (5th Cir. 1976), cert. denied, 430 U.S. 906 (1977); *Cisternas-Estay* v. *INS*, 531 F.2d 155, 158-159 (3d Cir.), cert. denied, 429 U.S. 853 (1976); *Pollgreen* v. *Morris*, 911 F.2d 527, 534 (11th Cir. 1990); *Escobar* v. *INS*, slip op. 7.[7] Consequently, EAJA is—by its terms—inapplicable to deportation proceedings, and hence no attorney's fees for work conducted in such proceedings can be awarded under it.

[7] In *Marcello*, this Court rejected the contention that a key APA provision requiring separation of prosecutorial and adjudicative functions applies in deportation proceedings. Similarly, in *Giambanco* v. *INS*, 531 F.2d 141, 145 (1976), the Third Circuit relied upon *Marcello* to hold that "the APA has no relevance" to BIA review of an immigration judge's refusal to revoke the plaintiff's deportation order. The Third Circuit again followed this reasoning in *Cisternas-Estay* v. *INS*, *supra*, and the Fifth Circuit followed *Giambanco* in *Ho Chong Tsao* v. *INS*, *supra*. All of these decisions recognized the inapplicability of 5 U.S.C. 554 in light of the comprehensive procedural scheme of the Immigration and Nationality Act.

In *Marcello*, the Court "consider[ed] all of the differences in the hearing provisions of the [Immigration and Naitonality Act and the APA] in determining whether the Administrative Procedure Act is to govern," 349 U.S. at 306. The Court concluded:

> [W]e cannot ignore the background of the 1952 immigration legislation, its laborious adaptation of the Administrative Procedure Act to the deportation process, the specific points at which deviations from the Administrative Procedure Act were made, the recognition in the legislative history of this adaptive technique and of the particular deviations, *and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings.*

Id. at 310 (emphasis added).

This Court's holding in *Marcello* that the Immigration and Nationality Act "effectuate[s] an exemption from the Administrative Procedure Act [and] expressly supersedes [its] hearing provisions" (349 U.S. at 310) has never been legislatively or judicially overruled; *Marcello*, in short, remains the law.[8] Congress is presumed to have been aware of *Marcello* when, upon EAJA's enactment in 1980, it defined

[8] Contrary to the assertions of petitioner and amici, changes in the INS regulations regarding the status of immigration judges and the BIA in no way undermine the continuing validity of *Marcello*'s holding that the APA does not apply in the context of deportation proceedings. The new regulations have been voluntarily adopted by the agency; they were not "mandated" by the APA (or, for that matter, by the Immigration and Nationality Act), nor has the agency purported to act in accordance with the strictures of the APA. See, *e.g.*, *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 234-238 (1973).

"adversary adjudication" as "an adjudication under section 554" of the APA. Cf., *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 698-699 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). *Marcello* therefore is dispositive here.[9]

As petitioner acknowledges (Pet. Br. 15, citing 18 *The Oxford English Dictionary* 947-951 (2d ed. 1989)), the word "under" has a number of dictionary meanings, including "subject to" or "governed by."[10] In the context of the phrase "under section 554," this meaning unquestionably is the one that "first springs to mind," *Kosak* v. *United States*, 465 U.S. 848, 854 (1984).[11] In construing the pertinent

[9] There is no merit to petitioner's assertion (Pet. Br. 14) that, notwithstanding *Marcello*, Section 554 applies to immigration proceedings because the APA does not itself explicitly exempt them. A proceeding is no more "under section 554" when it has been definitively determined by judicial construction to be exempt therefrom, than when it is exempt by virtue of express statutory language. Petitioner's reliance (Pet. Br. 15-16 n.3) on *Mississippi River Fuel Corp.* v. *Slayton*, 359 F.2d 106 (8th Cir. 1966), rev'd on other grounds *sub nom. Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162 (1967), is unfounded. That case held that the phrase "under applicable [s]tate law" encompassed *both* statutory law and judicial construction. *Id.* at 168. Thus, to the extent that *Mississippi River Fuel Corp.* is apposite here, it is contrary to petitioner's position.

[10] Cf. *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 808-809 (1988) (as in other "arising under" jurisdictional statutes, federal courts' jurisdiction over cases "arising under" federal patent law covers "cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law").

[11] The fact that this is the usual meaning of the word in the legal context is demonstrated by petitioner's filings in

part of the definition of "adversary adjudication" (5 U.S.C. 504(b)(1)(C)(i)), it is irrelevant that there may be other possible meanings of "under," because it must be assumed that the legislative purpose is expressed by the "ordinary meaning of the words used." *American Tobacco Co.* v. *Patterson*, 456 U.S. at 68, particularly when that meaning properly results in a narrow construction of the statute in favor of the sovereign. *Shaw*, 478 U.S. at 318; *In re Perry*, 882 F.2d at 538 ("words" of EAJA must be narrowly construed); *St. Louis Fuel & Supply Co.*, 890 F.2d at 449-451. Thus, the principles of plain meaning jurisprudence and strict construction of waivers of sovereign immunity converge in this case to preclude an expansive definition of the term "under section 554." *Escobar* v. *INS*, slip op. 6-7.

Of course, Congress could easily have adopted the definition of "adversary adjudication" for which petitioner and amici contend, by the simple expedient of adding a phrase such as "or similar provision of law" after the term "under section 554 of this title." It did not do so. There is therefore no textual basis for petitioner's revisionist suggestion (Pet. Br. 20) that "under section 554" should be construed to mean "the functional equivalent of a proceeding under [*sic*]" Section 554. Cf., *e.g.*, *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 522-523 (1984). This is classic rewriting of legislation in the lawyer's office, rather than in Congress itself. The language that Congress *did* adopt establishes that EAJA does not apply to de-

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this very case, which repeatedly use the word in that way. See, *e.g.*, Pet. 3 (this Court's jurisdiction "invoked under 28 U.S.C. § 1254(1)"), 2, 10 (claim for fees "under the Equal Access to Justice Act"); Pet. Br. 4, 6 (same).

portation proceedings. And it is, of course, the statutory text that is law.

II. THE STRUCTURE, HISTORY AND PURPOSES OF EAJA SUPPORT THE CONCLUSION THAT EAJA DOES NOT APPLY TO DEPORTATION PROCEEDINGS

The Court has recognized that it can be possible to rebut the "strong presumption" that the ordinary and natural meaning of the language of the statute expresses the intent of Congress. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431, 432 n.12 (1987). However, as one might expect, this is not to be done "lightly." *Id.* at 431. "When * * * the terms of a statute [are] unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances" (*Rubin* v. *United States*, 449 U.S. 424, 430 (1981) (internal quotation marks omitted))—*i.e.*, where there is a " 'clearly expressed legislative intention' contrary to" that plain language (*Cardoza-Fonseca*, 480 U.S. at 432 n.12, citing *United States* v. *James*, 478 U.S. 597, 606 (1986)). Accord *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). That is a general way of stating a more specific inquiry—whether this is "one of the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 310 (1989), quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), in turn quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

This is not that rare case. Not only is any "clearly expressed legislative intention" to the contrary lacking here; the statutory structure, legislative history,

and purposes of the statute all buttress its plain meaning.

A. The Statute's Structure Is Inconsistent With Petitioner's Attempt To Expand The Pertinent Statutory Text

EAJA's structure refutes petitioner's broad—and unnatural—interpretation of the term "under." As the D.C. Circuit aptly stated, "[t]he word 'under' appears several times in EAJA. In other locations, no creative reading is possible—'under' means 'subject [or pursuant] to' or 'by reason of the authority of.'" *St. Louis Fuel & Supply Co.*, 890 F.2d at 450; accord *Escobar* v. *INS*, slip op. 6 & n.3.[12] Where Congress uses the same term in different sections of a statute, that term should be given a consistent interpretation, absent clear evidence of contrary legislative intent. *Sorensen* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2504 (1990); cf. *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). *A fortiori*, where—as here—the term is used repeatedly in the *same section* of the statute, it should be given the same meaning throughout the section. There is no evidence that Congress intended to promote *inconsistent* interpretations of the term "under" in Section 504.

The structure of Section 504(b)(1)(C) itself supports our reading of "under section 554." That provision contains three separate definitions of "adversary adjudication": (i) the one at issue here, referring to adjudications under the APA; (ii) administrative appeals pursuant to the Contract Disputes Act of 1978 (41 U.S.C. 607); and (iii) "any hearing conducted under chapter 38 of title 31 [Administrative Remedies for False Claims and Statements, 31 U.S.C. 3801 *et seq.*]." The administrative hearings referred to in subsections (ii) and (iii) utilize procedures similar to those required by the APA, although they are not governed by that statute.[13] See

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[12] The D.C. Circuit in *St. Louis Fuel & Supply Co.* referred specifically to the following uses of the term: Section 504(a)(2) requires a party seeking fees to file an application with the agency showing that he "is eligible to receive an award under this section"; Section 504(c)(2) provides for an appeal by a party dissatisfied with "a determination of fees and other expenses made under subsection (a)"; and Section 504(d) provides for agency payment of "[f]ees and other expenses awarded under this subsection."

The term also occurs in a number of other places throughout Section 504, always with the meaning of "governed by." See Section 504(f) ("No award may be made under this section for costs, fees, or other expenses which may be awarded under section 7430 of the Internal Revenue Code of 1986."); Section 504(a)(2) (no decision on application for fees "shall be made under this section" while appeal of agency action is pending); Section 504(a)(3) ("The decision of the adjudicative officer of the agency under this section" shall be part of the record, and the agency decision on the application "shall be the final administrative decision under this section."); Section 504(b)(1)(B)(ii) (certain organizations "exempt from taxation under section 501(a) of [the Internal Revenue] Code" may be eligible parties regardless of net worth); Section 504(b)(1)(C)(iii) (including as "adversary adjudication" "any hearing conducted under chapter 38 of title 31 [governing administrative remedies for false claims and statements]"); Section 504(c)(2) ("The court's determination on any appeal heard under this paragraph" must be based only on the agency record.).

[13] The Program Fraud Civil Remedies Act of 1986 provides for administrative hearings that comply with the APA where the authority is subject to the APA "to the extent that such provisions are not inconsistent with the provisions of this

Fidelity Constr. Co. v. *United States*, 700 F.2d 1379, 1386-1387 (Fed. Cir.) (Contract Disputes Act of 1978), cert. denied, 464 U.S. 826 (1983). If petitioner's interpretation were correct, then the proceedings referred to in the second and third subsections would be covered by the first subsection, and thus there would be no need to identify them specifically.[14] Petitioner's interpretation thus would transform subsections (ii) and (iii) into mere surplusage, a "construction [that] violates the established principle that a court should 'give effect, if possible, to every clause and word of a statute.'" *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990); *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 103 (1989); *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510, n.22 (1986).

chapter." 31 U.S.C. 3803(g)(1)(A)(i). Where the authority is not subject to the APA, the head of the authority must promulgate procedures governing such hearings. 31 U.S.C. 3803(g)(1)(B). In either case, the person alleged to be liable is entitled to notice and a hearing (31 U.S.C. 3803(d)), a determination of liability on the record (31 U.S.C. 3803(f)), and a written decision, including findings and determinations (31 U.S.C. 3803(g)(4)).

The Contract Disputes Act of 1978 directs the Administrator for Federal Procurement Policy to issue guidelines for the procedures to be followed by agency boards of contract appeals. 41 U.S.C. 607(h). The Uniform Rules Of Procedure for Boards of Contract Appeals contemplate procedures modeled on those of a judicial proceeding, specifically including the preparation of a "record upon which the Board's decision will be rendered." Uniform R. 13, P. Latham, *Government Contract Disputes*, APP-10 (2d ed. 1983).

[14] While subsection (ii) was added specifically to overturn the result in *Fidelity Constr. Co.* v. *United States*, *supra* (see H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 15 (1985)), there is no similar explanation for the inclusion of subsection (iii). And if Congress had intended to adopt petitioner's interpretation of subsection (i), it would have been more logical for it to overturn *Fidelity Constr. Co.* by clarifying the language of subsection (i) to include proceedings similar to those under Section 554 than by adding a new subsection (ii), applying only to the Contract Disputes Act of 1978. Cf. *Escobar* v. *INS*, slip op. 8-9 (additions of subsections (ii) and (iii) "reflect Congress' awareness that the scope of the EAJA fee award provision is limited to 'adversary adjudications,' *i.e.*, those 'under' or governed by the APA").

B. The History Of The Pertinent Statutory Language Corroborates And Reinforces Its Plain Meaning

The history of the term "under section 554"—as found in the original 1980 enactment of EAJA, in its 1985 reenactment, and in the period between those dates—further suggests that the phrase "under section 554" means "subject to" or "governed by" that Section. Certainly nothing in that history provides the "clearly expressed" legislative intent that this Court has indicated is required in order to do that which is rare indeed—to override the plain meaning of the statutory language by resort to materials that were not themselves enacted into law. See *Cardoza-Fonseca*, 480 U.S. at 432 n.12.

1. *The Legislative History Of The 1980 Act Corroborates That Congress Equated The Terms "Under" And "Subject To"*

The 1980 version of EAJA originated in S. 265 in the 96th Congress.[15] The bill passed by the Senate

[15] The legislative history of the 1980 Act is somewhat convoluted. S. 265 passed the Senate in July 1979. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6-7 (1980). S. 265, H.R. 1649, and several related bills were then considered by the House Committee on the Judiciary, which reported S. 265 in amended form. *Id.* at 8. On September 26, 1980, the Senate

in July 1979 defined the administrative adjudications for which attorney's fees could be recovered as those "subject to" the APA. S. 265, 96th Cong., 2d Sess. (1980) (Senate version). The House Judiciary Committee hearings focused on H.R. 6429 and H.R. 7208 (both of which used the "subject to section 554" terminology), as well as on S. 265. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 7 (1980). The bill reported out by that Committee recommended passage of S. 265, with amendments. One of the Committee's amendments narrowed the administrative adjudication provision to limit coverage to adversary administrative adjudications—ones in which the government's position is represented. In the course of making that change, the House version of S. 265 adopted the current terminology, defining an adversary adjudication as one "under section 554 of this title." That terminology was preserved in the amendment to H.R. 5612 passed by the Senate, adopted by the Conference Committee, and enacted.

The Reports accompanying these bills convincingly demonstrate that Congress attached no significance to the change in terminology, but instead intended "under" to mean the same as "subject to." Thus, the Senate Report on the original S. 265, which used the term "subject to," explained that this language "covers only adjudications *under* 554 of title 5 and not rulemaking or other administrative proceedings."

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attached S. 265, as amended by the House, to the Senate's amendments to H.R. 5612, a bill to amend the Small Business Act, and requested a conference. 126 Cong. Rec. 27,677-27,683 (1980). The Conference Report recommended adoption of the Senate version of H.R. 5612. H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 1 (1980). That was the bill enacted, with an amendment not here relevant. 126 Cong. Rec. 28,637-28,649, 28,841-28,846 (1980).

S. Rep. No. 253, 96th Cong., 1st Sess. 15 (1979) (emphasis added).[16] Moreover, H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11-12 (1980), explained that the bill it reported to the House was "essentially the same" as the Senate version of S. 265, specifically identifying a number of changes, including one designed "[t]o limit [covered] administrative proceedings to 'adversary adjudications' in which the position of the U.S. is represented." Although the House Report thus focused precisely on the definition change, it did *not* suggest that there was any significance in the change from "subject to" to "under."[17]

Ignoring this evidence, petitioners and amici focus on two words in a single statement in the Conference Report: "[t]he conference substitute defines adversary adjudication as an agency adjudication *defined under* the Administrative Procedure[] Act." H.R.

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[16] The Report further explained that "[t]he definition of 'adjudication' for the purposes of this section excludes ratemaking and licensing application hearings which are considered adjudication *under section 554* of title 5 for other purposes. However, the exclusion does not extend to proceedings *under section 554* involving the * * * modification * * * of a license." (S. Rep. No. 253, *supra*, at 17 (emphasis added)).

[17] It would, in any event, have been anomalous for the Committee to have intended—in the course of making a change designed to *limit* the coverage of EAJA—to create, without explanation, a potentially broad and undefined *expansion* of its coverage to any proceeding that was in some way similar to a proceeding subject to Section 554. Instead, as the D.C. Circuit observed in *St. Louis Fuel & Supply Co.*, 890 F.2d at 451, "[i]t seems most plausible, given the legislative silence regarding the word change, that the drafters [of the House amendments to S. 265] made the substitution either inadvertently or because one word ('under') sounded better than two ('subject to') in the new location."

Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980) (emphasis added). That statement, ambiguous in itself,[18] does not, in context, support petitioner's interpretation. The Conference Committee emphasized that the definitions of adversary adjudication in the Senate bill and the House-passed version of S. 265 are identical, and that "the conference substitute adopts the Senate provision." *Ibid.* The language on which petitioner relies can scarcely be read to suggest that the Conference Committee nevertheless intended to change the interpretation of that language given in the earlier House and Senate Reports —let alone that that intention was stated with the requisite clarity to override the statutory text and the House and Senate Reports to boot. Accordingly, as several courts of appeals have recognized, "[t]here is no evidence in the legislative history to indicate that the conference committee understood the term 'defined under' to include within EAJA coverage those proceedings that are not governed by section 554 but instead are merely conducted in a similar manner." *Owens* v. *Brock*, 860 F.2d 1363, 1366 (6th Cir. 1988); accord Pet. App. A15-A19; *Clarke* v. *INS*, 904 F.2d 172, 175-176 (3d Cir. 1990); *Hodge* v. *United States Dep't of Justice*, 929 F.2d 153, 156-157 (1991); *St. Louis Fuel & Supply Co.*, 890 F.2d at 450; *Escobar*, slip op. 7, 9-10.

[18] While a proceeding that is not subject to the APA can certainly be similar to, or even identical to, one defined under the APA, it would not ordinarily be characterized as itself "defined under" the APA. Cf. *Owens* v. *Brock*, 860 F.2d at 1366 (suggesting that Conference Report statement supports "precisely the opposite interpretation" to that of petitioner).

2. *Prior To EAJA's 1985 Reenactment The Attorney General's Regulations Authoritatively Interpreted EAJA As Inapplicable To Deportation Proceedings*

Soon after EAJA's enactment in 1980, the Administrative Conference of the United States (ACUS) issued model rules for agency implementation of EAJA. 46 Fed. Reg. 32,900 (1981). ACUS had originally proposed that EAJA fees should be awarded in administrative adjudications not subject to the APA.[19] In issuing the model rules, ACUS responded to comments that this "tentative interpretation of the phrase 'under section 554' was impermissibly broad, since waivers of sovereign immunity are to be construed narrowly, and that the draft model rules' liberal construction would distort the plain meaning of the phrase." 46 Fed. Reg. 32,901 (1981). ACUS further recognized that "if Congress did intend to restrict awards to cases required to be conducted under the procedures of section 554, then agencies have no legal authority to award fees under the Act in any other class of cases." *Ibid.* Accordingly, ACUS left it up to individual agencies to determine in the first instance whether specific agency proceedings are "under section 554" (*ibid.*; see also *id.* at 32,902).

In promulgating the Department of Justice regulation, the Attorney General determined—on the basis

[19] The letter to the House Judiciary Committee from the ACUS Executive Secretary, on which petitioner relies (Pet. Br. 18-19), is an example of this earlier interpretation. See *Award of Attorneys' Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 536 (1980).

of *Marcello*—that deportation proceedings do not fall within EAJA's reach. 28 C.F.R. 24.103; 46 Fed. Reg. 48,921, 48,922 (1981) (interim rule with request for public comment); 47 Fed. Reg. 15,776 (1982). Although the regulations were submitted to ACUS pursuant to 5 U.S.C. 504(c)(1), ACUS did not question the Attorney General's view regarding the non-applicability of EAJA to deportation proceedings.[20] See 47 Fed. Reg. 15,774, 15,775-15,776 (1982). Furthermore, Congress indicated no disagreement with the Attorney General's view, either when it reenacted and amended 5 U.S.C. 504 in 1985 or at any time thereafter. See *Cannon* v. *University of Chicago*, 441 U.S. at 698-699; *Lorillard* v. *Pons*, 434 U.S. at 580-581 (Congress presumptively aware of relevant administrative interpretations). The failure of either ACUS or Congress to take issue with the Attorney General's interpretation of the EAJA definition corroborates that the Attorney General correctly interpreted the legislative intent. Moreover, as the court of appeals here recognized (Pet. App. A25-A26), the Attorney General's interpretation in the regulations of the nature of deportation proceedings—an interpretation that suggests the non-applicability of EAJA thereto—is entitled to judicial deference.

[20] In relevant part, 5 U.S.C. 504(c)(1) provides that "[a]fter consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses."

3. *The 1985 Reenactment Of EAJA Made No Change In The Pertinent Statutory Language And Congress Expressed No Intent To Repudiate The Established Interpretation Of That Language*

In 1985, Congress reenacted EAJA and made several specific changes, none of which is relevant here.[21] The definition of "adversary adjudication" remained precisely as it was in the 1980 Act. Petitioners and amici suggest that certain language in the 1985 House Committee Report (H.R. Rep. No. 120, 99th Cong., 1st Sess. (1985)) supports their interpretation of this definition. As this Court explained in refusing to be swayed by other far more directly relevant language in the same Report (*Pierce* v. *Underwood*, 487 U.S. 552, 566-567 (1988)):

> If this language is to be controlling upon us, it must be either (1) an authoritative interpretation

[21] For example, Congress expanded the definition of "adversary adjudication" to include any appeal of a decision made pursuant to Section 6 of the Contract Disputes Act of 1978. 41 U.S.C. 605. See 5 U.S.C. 504(b)(1)(C)(ii). This change overruled the decision in *Fidelity Constr. Co.* v. *United States*, 700 F.2d 1379 (Fed. Cir.), cert. denied, 464 U.S. 826 (1983), which held that EAJA did not apply to such administrative appeals. H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 15 (1985). Congress also overruled the holding in *Tulalip Tribes* v. *FERC*, 749 F.2d 1367 (9th Cir. 1984), that, in light of a statute denying costs for certain FERC proceedings, an award of fees under EAJA for such proceedings was also precluded. See H.R. Rep. No. 120, *supra*, at 17. In addition, Congress amended the definition of the term "final judgment" for purposes of determining the timeliness of a fee application or "prevailing party" status, and made clear that the statutory term "position of the United States" refers to the underlying agency action as well as the government's litigation position.

> of what the 1980 statute meant, or (2) an authoritative expression of what the 1985 Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. Nor can it reasonably be thought to be the latter—because it is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation. (Quite obviously, reenacting precisely the same language would be a strange way to make a change.)

This analysis applies *a fortiori* here, where petitioner and amici rely only on strained implications from language in the 1985 House Report, which contains no statement directly supporting their interpretation of the reenacted statutory language.

Petitioner (Br. 20) and amicus ABA (Br. 15 & n.11) note that the House Committee disapproved of a variety of interpretations of EAJA, one of which it characterized as "overly technical." H.R. Rep. No. 120, *supra*, at 18 n.26. See note 21, *supra*. Nothing in the Committee's criticisms of these interpretations of unrelated provisions of the 1980 Act suggests a similar dissatisfaction with the interpretation of the "under section 554" language of Section 504 (b)(1)(C). Indeed, the failure, by contrast, to criticize the Attorney General's conclusion that INS

deportation proceedings are not covered by that definition suggests agreement with that conclusion.

Petitioner (Br. 21) and amici (ABA Br. 14; AILA Br. 13) also point to the statement in the House Report that social security administrative hearings "in which the Secretary is represented are covered by [EAJA]." H.R. Rep. No. 120, *supra*, at 10. They read that statement as implying that coverage under Section 554 is unnecessary, since it is an open question whether social security administrative proceedings are subject to the APA. See *Richardson* v. *Perales*, 402 U.S. 389, 409 (1971).[22] But no committee report—and certainly not Congress itself—made any statement denying the general applicability of the Section 554 criterion. To the contrary, Congress reenacted the "under section 554" requirement. In short, while the House Report stated that EAJA is applicable to social security proceedings in certain unusual circumstances (*i.e.*, where the Secretary's position is represented),[23] there is *no*

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[22] Indeed, Amicus ABA goes so far as to suggest (Br. 13-15) that the House Report demonstrates that *all* agency proceedings in which the government takes an adversary position are covered by the 1985 Act—even though the reference to Section 554 remains in the statute.

[23] The Third Circuit in *Clarke* observed that the 1985 legislative history "strongly suggests that Congress believed social security proceedings to be covered by section 554," 904 F.2d at 177. That belief would explain the remarks in the House Report. No such belief is plausible with respect to immigration proceedings, however. Although *Richardson* v. *Perales*, 402 U.S. at 409, had left the question open with respect to social security proceedings, this Court had expressly ruled in *Marcello* that administrative immigration proceedings are exempt from the APA. Thus, in the immigration area, in contrast to the social security area, there

statement at all regarding administrative immigration proceedings—notwithstanding the regulation previously promulgated by the Attorney General holding that EAJA does not cover administrative immigration proceedings.

C. The Statutory Purposes Of EAJA Are Consistent With Its Plain Language

Petitioner and amici rely upon general statements in EAJA and its legislative history that the purpose of the law is to encourage persons aggrieved by unjustified agency action to vindicate their rights undeterred by litigating expenses. See, *e.g.*, Pet. Br. 22; ABA Br. 9-10, 15.[24] But such generalities shed little light on the meaning of the specific statutory language involved in this case. This Court has previously had occasion to explain the dangers in an interpretive approach driven by resort to legislative purposes set forth at a high level of generality:

> The "plain purpose" of legislation * * * is determined in the first instance with reference to the plain language of the statute itself. Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon

was no longer even a live controversy regarding the question of APA coverage.

[24] Petitioner (Br. 13, 23-24) and amici (AILA Br. 17; ABA Br. 16-24) also suggest that an EAJA award should be available because the complexity of deportation proceedings and the vulnerability of those subject to them make the assistance of counsel particularly desirable. Such policy arguments are appropriately directed to Congress, not to the courts. See, *e.g.*, *Kosak* v. *United States*, 465 U.S. at 862; *Heckler* v. *Turner*, 470 U.S. 184, 212 (1985); *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987); *Escobar* v. *INS*, slip op. 10.

> to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means of effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Board of Governors of the Federal Reserve System v. *Dimension Financial Corp.*, 474 U.S. 361, 373-374 (1986) (citation omitted).

The "plain purpose" analysis of petitioner and amici provides an example of just this error. Under that analysis, the "general purpose" of EAJA could, despite carefully drafted legislative limitations, support application of EAJA in almost any administrative action in which government action is successfully challenged. The "basic purposes" upon which petitioner relies (Pet. Br. 10)—removal of economic disincentive to litigation, deterrence of unjustified government action, and encouragement of litigation to help formulate public policy—provide no meaningful limits, and take no account of the limitations Congress enacted. Thus, petitioner's "purpose" analysis would effectively swallow up the specific statutory limitations on EAJA's coverage. That is unsound interpretive methodology fundamentally incompatible with our democratic system. As this Court pointed out in *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987), "no legislation pursues its purposes at all costs." Instead, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of

legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.* at 526 (emphasis in original).

Here, an important part of the statutory purpose is, of course, reflected in the "under section 554" language itself. As the House Report on the 1980 Act states, "[i]n part, the decision to award fees only in adversary adjudications reflects a desire to narrow the scope of the bill in order to make its costs acceptable." H.R. Rep. No. 1418, *supra*, at 14.[25] Cf. *Hallstrom* v. *Tillamook County*, 110 S. Ct. at 310 ("legislative history indicates an intent to strike a balance"). Thus, it was eminently sensible for Congress to adopt a "bright-line rule" to determine EAJA's applicability (*St. Louis Fuel & Supply Co.*, 890 F.2d at 451; *Escobar*, slip op. 10; accord *Clarke*, 904 F.2d at 178), for the twin purposes of limiting the potential liability of the United States and eliminating the need for case-by-case litigation of the statute's applicability.[26]

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[25] Amicus ABA acknowledges that "[a]dministrative EAJA's limitation to adversary adjudications is also dictated, in part, by economics." ABA Br. 7 n.3 (citing House Report).

[26] In contrast, petitioner's "functionally equivalent" standard would make coverage turn on whether the proceeding in question "in substance, * * * was the functional equivalent of a proceeding under the APA." Pet. Br. 20. Cf. AILA Br. 12 (definition covers adversary "trial type" proceedings). Neither standard offers any way of determining precisely which features of the administrative proceeding are important in determining whether it is sufficiently similar to those subject to the APA to warrant coverage under EAJA. Such

In sum, there is no " 'clearly expressed legislative intention' contrary to [the] language [of the statute] which would require [the Court] to question the strong presumption that Congress expressed its intent" through the ordinary meaning of the language it chose. *Cardoza-Fonseca*, 480 U.S. at 432 n.12. "Under" Section 554 means "governed by" or "subject to" Section 554.

III. EAJA SHOULD NOT BE READ TO EFFECT A PARTIAL REPEAL OF 8 U.S.C. 1362

Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, provides that "[i]n any exclusion

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vague and ill-defined standards constitute an open invitation to yet more litigation.

The interpretation urged by petitioner could thus reach well beyond the immigration proceedings at issue in this case. Petitioner's theory is that EAJA fees should be available in any statutorily mandated administrative proceeding determined by a court to be functionally equivalent to a Section 554 adjudication. This could include, *inter alia*, the proceedings of the Federal Energy Regulatory Commission at issue in *St. Louis Fuel & Supply Co.*, *supra*; the Department of Labor administrative proceedings under the Federal Employees Compensation Act at issue in *Owens* v. *Brock*, *supra*; and the proceedings of the Merit Systems Protection Board at issue in *Zeizel* v. *Pierce*, 784 F.2d 405, 407-408 (D.C. Cir. 1986). In addition, fees might also be available where an agency has voluntarily adopted APA-type procedures, although not compelled to do so by statute. But cf. *Smedberg Machine & Tool, Inc.* v. *Donovan*, 730 F.2d 1089 (7th Cir. 1984) (holding that labor certification proceedings before Department of Labor were not "under section 554" because hearings were not statutorily required). Under the theory advanced by amicus ABA, any administrative proceeding in which the government is represented would apparently be covered by EAJA—notwithstanding the "under section 554" language of 5 U.S.C. 504(b)(1)(C)(i).

or deportation proceedings * * * the person concerned shall have the privilege of being represented (*at no expense to the government*)" (emphasis added).[27] This provision further buttresses the court of appeals' holding that EAJA does not apply to deportation proceedings. Pet. App. A27-A34; *Clarke* v. *INS*, 904 F.2d at 177.

It is axiomatic that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Furthermore, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Mancari*, 417 U.S. at 550.

In this case, there is neither an affirmative showing in EAJA of an intention to repeal the Immigration Act's flat prohibition on fee liability for deportation and exclusion proceedings, nor a showing that EAJA and the Section 1362 ban are irreconcilable. There is no "positive repugnancy" between EAJA and Section 1362 so that "they cannot mutually coexist." *Radzanower*, 426 U.S. at 155. Accordingly, the explicit, absolute bar to fee awards in immigration proceedings contained in Section 1362 should be regarded as a narrow exception to the general provisions of EAJA (even if those provisions could otherwise fairly be interpreted as expansively as petitioner contends). See *e.g.*, *Fourco Glass Co.* v.

[27] A similar provision is found in Section 242(b), 8 U.S.C. 1252(b), which sets forth the specific procedures governing the conduct of deportation proceedings.

Transmirra Prods. Corp., 353 U.S. 222, 228-229 (1957). This harmonization of the two statutes is consistent not only with fundamental canons of statutory construction, but also with the principle that waivers of sovereign immunity (such as EAJA) must be express and should be strictly construed—a principle that itself counsels against finding repeal by implication of a statute expressly refusing to waive sovereign immunity.

Ignoring these principles, petitioner and amicus AILA argue that EAJA creates an exception to the express ban on fee awards contained in Section 1362, because, they assert, Section 1362 is not a "fee-shifting" statute. Pet. Br. 28-29; AILA Br. 18-19. This argument rests on a misreading of the parallel EAJA provision in 28 U.S.C. 2412(d)(1)(A), which authorizes awards of attorney's fees under EAJA in civil actions "[e]xcept as otherwise specifically provided by statute." Because that provision was evidently designed to insure that EAJA would not restrict the more liberal fee-shifting provisions in other statutes, such as Title VII, Congress found it unnecessary to include similar language in the EAJA provisions dealing with attorney's fees in administrative adjudications. Nothing in either the civil action or administrative provisions of EAJA suggests that EAJA was intended to override the specific ban on fee shifting contained in 8 U.S.C. 1362.[28]

[28] Petitioner incorrectly analogizes to *Wolverton* v. *Heckler*, 726 F.2d 580 (9th Cir. 1984), a case involving the fee cap provision of the Social Security Act, 42 U.S.C. 406(b). In *Wolverton*, the court held that 42 U.S.C. 406(b) does not preclude an EAJA fee award because the Social Security Act "specifies only a limitation on the amount that a claimant must pay toward lawyers' fees." 726 F.2d at 582; accord

There is no indication whatever that EAJA was intended to abrogate 8 U.S.C. 1362, which specifically bars the award of attorney's fees in a particular type of proceeding. Instead, EAJA merely waived the common law rule against attorney's fees, to the extent that rule had not already been waived by specific attorney fee statutes permitting awards against the government. EAJA thus removed common law and sovereign immunity barriers, not an express provision barring fee shifting in a particular statutory scheme. See generally H.R. Rep. No. 1418, *supra*, at 8-9.[29]

Watford v. *Heckler*, 765 F.2d 1562, 1566 (11th Cir. 1985). In the instant case, in contrast, 8 U.S.C. 1362 expressly bars fee shifting, since it states that representation in administrative immigration proceedings shall be "at no expense to the Government." Thus, in the case at bar, unlike *Wolverton*, the fee statute in question does not in any way regulate "the amount that a claimant must pay toward lawers' fees"; instead, it explicitly prohibits requiring the government to pay the claimant's attorney fee.

[29] Amicus AILA (Br. 19-20) attempts to find significance for this purpose in Congress's disapproval of the holding of *Tulalip Tribes* v. *FERC*, 749 F.2d 1367 (9th Cir. 1984). See H.R. Rep. No. 120, *supra*, at 17. In *Tulalip*, the court relied upon 16 U.S.C. 825p, denying costs in proceedings under the Federal Power Act, to hold that an award of fees under EAJA was precluded. The court focused on the language of the "civil action" EAJA section, and reasoned that "no award of fees 'in addition to any costs awarded' [as there provided] is possible because no costs may be awarded." 749 F.2d at 1368. But 8 U.S.C. 1362, by contrast, does not merely deny costs. Instead, it states that the person concerned in an exclusion or deportation proceeding shall have the privilege of being represented, but "at no expense to the Government." There is, accordingly, no need here, as in *Tulalip*, to infer the unavailability of EAJA fees from the mere unavailability of *costs* under a different statute—because the statute at issue here expressly provides that *representation* in the proceedings in question shall be "at no expense to the Government." It follows that Congress's rejection of *Tulalip* in no way suggests that EAJA fees should be available in this case.

In sum, EAJA does not implicitly repeal the mandate of 8 U.S.C. 1362 that the representation in administrative deportation proceedings shall be "at no expense to the Government." For this additional reason, no EAJA award may be made for representation in such proceedings. Hence, the plain terms of not just one, but two federal statutes bar an award of attorney's fees in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JUNE 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20592